113 - 689

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.4

No. ~~1162.~~ 749

FRANCIS W. BOYER, PLAINTIFF IN ERROR,

vs.

DANIEL BOYER, JOHN LEAHEY, AND A. J. SHORTALL, COUNTY COMMISSIONERS OF SCHUYLKILL COUNTY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

FILED OCTOBER 17, 1883.

It is proper however, for us to supply a section of the final decree, inadvertently omitted from briefs of both appellant and respondent, being the *fifth* section—the *fifth* as printed in both briefs, should be the *sixth* section, thus explaning the apparent omission of *sixth* section in both briefs.

Fifth. That said dismissal be without prejudice to any claims or rights and claims of any defendant as against each other connected with the matters set forth in said Master's report.

And we ask that same be read as part of decree, printed on page 12 of our brief, and inadvertently omitted by clerical error therefrom.

F. N. JUDSON,
J. H. OVERALL,

WITH ABOVE ARE,
MILLS & FLITCRAFT,

For Respondents.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 1162.

FRANCIS W. BOYER, PLAINTIFF IN ERROR,

vs.

DANIEL BOYER, JOHN LEAHEY, AND A. J. SHORTALL, COUNTY COMMISSIONERS OF SCHUYLKILL COUNTY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

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5 THE UNITED STATES OF AMERICA, *ss.*:

To Daniel Boyer, John Leahey, and A. J. Shortall, county commissioners of Schuylkill county, greeting:

You are hereby cited and amonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the prothonotary's office of the supreme court of the Commonwealth of Pennsylvania for the eastern district of Pennsylvania in the third circuit, wherein Francis W. Boyer is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, shall not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand, this first day of September, in the year of our Lord one thousand eight hundred and eighty-three.

ULYSSES MERCUR,
Chief Justice of Pennsylvania.

Sept. 6, 1880.

Service of above notice accepted for def'ts in error.

A. W. SCHALCK,
County Solicitor.

6 FRANCIS W. BOYER
vs.
DANIEL BOYER, JOHN LEAHY, AND A. J. SHORTALL, Commissioners of the County of Schuylkill.

Know all men by these presents, that we, Francis W. Boyer, of the borough of Pottsville, county of Schuylkill, State of Pennsylvania, and William Newell, of the same place, are held and jointly bound unto the said Daniel Boyer, John Leahy, and A. J. Shortall, commissioners of the county of Schuylkill, in the sum of three hundred dollars, to be paid to the said obligees, their certain attorney, successors, or assigns, to which payment, well and truly to be made, we bind ourselves, our respective heirs, executors, and administrators firmly by these presents.

Sealed with our seals, this twenty-eighth day of August, in the year one thousand eight hundred and eighty-three.

Whereas the above-bounded Francis W. Boyer hath obtained a writ of error to the Supreme Court of the United States to reverse
7 the judgment rendered by the supreme court of Pennsylvania, eastern district, in a certain cause wherein the said Francis W. Boyer was appellant and the said obligees were the appellees, (being No. 33, July term, 1883,) upon an appeal of the court of common pleas of Schuylkill county, in equity, wherein the said court of common pleas dismissed the bill of the said Francis W. Boyer, the plaintiff therein, at the costs of said plaintiff, which judgment of the court of common pleas of Schuylkill county was affirmed by the said supreme court of Pennsylvania upon said appeal.

Now, the condition of this obligation is such that if the said Francis W. Boyer shall prosecute his said writ of error with effect, and answer all costs if he fail to make his plea good, then this obligation to be null and void, otherwise to be and remain in full force and virtue.

WM. NEWELL. [SEAL.]
FRANCIS W. BOYER. [SEAL.]

Sealed and delivered in the presence of us—
C. W. WELLS.

Approved Sept. 1st, 1883.

ULYSSES MERCUR,
Chief Justice of Pennsylvania.

8 STATE OF PENNSYLVANIA, } ss:
County of Schuylkill, }

Among the records and proceedings of the court of common pleas in and for the county and State aforesaid, No. —, May term, 1883, No. 1, (in equity), inter alia, it is thus contained.

Equity Docket, No. 2, May Term, 1883.

FRANCIS W. BOYER
vs.
DANIEL BOYER, JOHN LEAHY, and A. J. SHORTALL, County Commissioners, } Bill in Equity. Filed 12th March, 1883.

$2.25 paid by attorney.

Per curiam:

On account of the late hour at which the above case was presented to the court and argued by counsel, we have not had sufficient time to write out an opinion in the above case. It is said to be a matter of public importance that a speedy decision be rendered, so that the same may be reviewed by the court above. We will therefore sustain the demurrer, and dismiss the bill at the costs of the plaintiff.

Entered in judgment, J. & D.

10th April, appeal to supreme court, with recog. filed.

9 STATE OF PENNSYLVANIA, } ss:
County of Schuylkill, }

I, William J. McCarthy, prothonotary of the court of common pleas in and for the county and State aforesaid, do hereby certify that the foregoing writing is a true and perfect copy of the equity docket entry in the case therein stated. Wherein Francis W. Boyer is plaintiff, and Daniel Boyer, John Leahy and A. J. Shortall, county commissioners, are defendants, so full and entire as the same appears of record in said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Pottsville, this eleventh day of April, A. D. 1883.

[SEAL.] WM. J. McCARTHY, *Prothonotary.*

10 In the Court of Common Pleas of Schuylkill County. In Equity. May Term, 1883.

FRANCIS W. BOYER
vs.
DANIEL BOYER, JOHN LEAHEY, and A. J. SHORTALL, County Commissioners.

Bill.

To the within-named defendants:

You are hereby notified and required within fourteen days after service on you, exclusive of the day of such service, to cause an appearance to be entered for you in the court of common pleas of Schulykill county to the within bill of complaint, and to observe what the court shall direct.

Witness our hand at Pottsville this — day of March, 1883.

C. W. WELLS,
Solicitor for Plaintiff.

NOTE.—If you fail to comply with the above directions by entering an appearance in the prothonotary's office within fourteen days you will be liable to have the bill taken *pro confesso* and a decree made against you in your absence.

Filed 12 March, 1883.

11 In the Court Common Pleas of Schuylkill County. In Equity.

FRANCIS W. BOYER
vs.
DANIEL BOYER, JOHN LEAHY, and A. J. SHORTALL, Commissioners of the County of Schuylkill.

To the Honorable the Judges of said Court:

Your orator, the said plaintiff, complains and says:

I. That he is a resident of the borough of Pottsville, in
12 said county, and is the owner of ten shares of the capital stock of the Pennsylvania National Bank, an association located in said borough and organized under the National Banking act of 3 June, 1864, each of the said shares having a par value of of $100.

II. That the defendants are the county commissioners of the county of Schuylkill, and have assessed said shares of stock for taxation at a valuation of $100, and have threatened and declared their intention, and are about to levy a county tax for the year 1883 upon said shares of stock.

Your orator, claiming that said shares of national bank stock are not liable to local taxation, further represents:

III. That by Section 5219 of the Revised Statutes of the United States it is provided with reference to national banks:

"Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to two restrictions, *that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State*, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or county where the bank is located and not elsewhere.

IV. That the act of assembly of Pennsylvania, approved 31 March, 1870, (P. L., 43,) provides: "That all the shares of
13 national banks, * * and of banks and savings institutions, * * shall be taxable * * for county, school, municipal, and local purposes at the same rate as now, is or may hereafter be assessed and imposed upon other moneyed capital in the hands of individual citizens of the State."

V. That by act of Assembly of Pennsylvania (3 January, 1868, P. D. 1318) it is provided that the shares of stock held by any shareholder in any institution or company incorporate under the laws of this State, which, in its corporate capacity is liable to and pays into the State treasury taxes on capital stock, shall not be liable in the hands of said stockholder personally for county or local taxation.

a. That for the year 1881, as is shown by the public report and by the books of the auditor general of Penna., the sum of $1,692,938.66 was paid into the State treasury as tax upon the capital stock of such corporations by them in their corporate capacity, which sum of money was paid upon a gross capital stock, of the corporations paying the same, of the value, approximately stated of 564 millions of dollars.

b. That it appears, as is shown by the books and published report of the secretary of internal affairs for the year 1881, that the total valuation throughout the State for that year of "all mortagages, money owing by solvent debtors, whether by promissory note, penal or single bill, bond or judgment, also all articles of agreement and accounts bearing interest, owned or possessed by any person or persons whatsoever, (except notes or bills for work or labor done,
and all obligations given to banks for money loaned and bank
14 notes) and all public loans or stocks whatsoever, except those issued by this State or the United States, and all moneys loaned or invested on interest in any other State and all other moneyed capital in the hands of individual citizens of the State," amounts to $74,931,765, and that

c. for the same year, as is shown by the books and published reports of the auditor general, a tax was paid into the State treasury

upon corporation and municipal loans, not probably included in the foregoing sum, upon an aggregate valuation of $51,404,162.50.

VI. That by the provisions of section 1 of the act of 10 June, 1881, (P. L. 99,) all mortgages, judgments and recognizances whatsoever, and all moneys due or owing upon articles of agreement for the sale of real estate were exempt from all taxation except for State purposes.

VII. That the section 2 of said act of 1881, exempts from local taxation in the hands of the holders thereof, all loans issued by corporations paying interest thereon, where such corporations pay into the State treasury the State tax of 4 mills on each dollar thereof, (see above *c*), and by act of 1 May, 1854, (P. L. 535,) "all bonds or certificates of indebtedness of any railroad company incorporated by this Commonwealth be and the same *shall be liable to taxation for State purposes only*.

VIII. That the total paid-in capital of all the State banks and savings institutions in said Commonwealth, other than national banks, as appears by the books and published reports of the auditor general for the year 1881, is $7,161,740.68, while the total paid-in capital of the national banks located within said State, in said year, amounted to $57,452,051.

15 Your orator therefore prays for equitable relief as follows:

I. That the defendants be enjoined specially until hearing and perpetually thereafter, from levying the said county tax for the year 1883, upon your orator's shares of national bank stock aforesaid.

II. General relief.

III. Service by copy.

C. W. WELLS.
Plaintiff's Solicitor.

16 FRANCIS W. BOYER
vs.
DANIEL BOYER *et al.*, Commissioners of Schuylkill county. } In Equity. May Term, 1883.

To W. J. McCarthy, Esq., *Prothonotary.*

SIR: I hereby appear for the defendants in the case above stated.

A. W. SCHALCK,
County Solicitor.

[Endorsed:] No. 1, May term, 1883. In equity. Francis W. Boyer *vs.* Daniel Boyer *et al.* Appearance for def'ts. Filed 24 Mar. 1883. Schalck, county solicitor.

17 In the Court of Common Pleas of Schyl. Co.

FRANCIS W. BOYER
vs.
DANIEL BOYER *et al.*, Commissioners of Schuylkill county. } In Equity. May Term, 1883.

The demurrer of the above-named defendants to the said bill of complaint of the said plaintiff.

The defendants above named, protesting against the truth of the matters contained in said bill, do demur in law to the said bill, and for the cause of demurrer do show specially and particularly that the matters set out on paragraghs V, VI, VII, and VIII of said bill are immaterial and irrelevant to the issue proposed to be raised, and are also insufficiently set forth; and furthermore, the said defendants do show generally that said plaintiff hath not, in the whole or in any part of his said bill, made out or stated such a case as doth or ought in law or equity to entitle him to the relief prayed for, or to any other relief. Wherefore, and for divers other good causes of demurrer appearing in the said bill, these defendants do demur to the
18 said bill and to all the matters and things therein contained, and pray the judgment of this honorable court whether they shall be compelled to make any further or other answers to the said bill, and pray to be hence dismissed with their reasonable costs on their behalf sustained.

A. W. SCHALCK,
County Solicitor.

Filed 24 Mar., 1883.

19 F. W. BOYER
v.
DANIEL BOYER *at al.*, Comssn. } No. 1, May Term, 1883. Bill in Equity. Demurrer.

Per Curiam:

On account of the late hour at which the above case was presented to the court, and argued by counsel as have not had sufficient time to write out an opinion in the above cases, it is said to be a matter of public importance that a speedy decision be rendered, so that the same may be reviewed by the court above. We will therefore sustain the demurrer, and dismiss the bill at the costs of the plaintiff.

By the court:

WM. J. McCARTHY, *Prothy.*

Filed 9 April, 1883.

20 In the Court of Common Pleas of Schuylkill County, May Term, 1883.

FRANCIS W. BOYER
v.
DANIEL BOYER, JOHN LEAHEY, and A. J. SHORTALL, Commissioners of the County of Schuylkill. } In Equity.

And now, 10 April, 1883, the said Francis W. Boyer, plaintiff, appeals to the supreme court of Pennsylvania for the eastern district from the decree of the court of common pleas of Schuylkill county dismissing plaintiff's bill.

FRANCIS W. BOYER.

SCHUYLKILL COUNTY, *ss:*

Francis W. Boyer, the above-named appellant, being duly sworn, says that said appeal is not intended for delay.

FRANCIS W. BOYER.

Sworn and subscribed this 10th of April, 1883, before me,
WM. J. McCARTHY, *Prothy.*

21 STATE OF PENNSYLVANIA, } *ss:*
County of Schuylkill, }

I, William J. McCarthy, prothonotary of the court of common pleas of Schuylkill county, do hereby certify that the foregoing is the record and process and all things touching the same so filed and entire as the remain of record in said court sitting in equity wherein Francis Boyer is plaintiff, and Daniel Boyer, John Leahey, and A. J. Shortall, county commissioners, are defendants.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this eleventh day of April, in the year of our Lord one thousand eight hundred and eighty-three.

[SEAL.] W. J. McCARTHY, *Prothonotary.*

22 SCHUYLKILL COUNTY, *ss:*

We, Francis W. Boyer, William Newell, and P. A. McCabe, of the borough of Pottsville, do severally acknowledge themselves to be indebted to the said Daniel Boyer and others, defendants, commissioners, in the sum of fifty dollars, to be levied of our goods and chattels, land and tenements, respectively, and to be void on condition that the said Francis W. Boyer shall prosecute said appeal with effect, and shall pay all costs that may be adjudged against him.

FRANCIS W. BOYER,
WM. NEWELL,
P. A. McCABE.

Taken and acknowledged April 10, 1883, before me—
WM. J. McCARTHY, *Proth'y.*

23 July Term, 1883.

Appeal of Francis W. Boyer.

Appeal from the Court of Common Pleas of the County of Schuylkill. Filed April 11, 1883.

April 16, 1883. Record returned and filed *Eo die.* Assignments of error filed.

April 19, 1883. Argued.

May 21, 1883. The decree of the court below is now affirmed at the costs of the appellant.

Opinion by Gordon, J.

Aug. 20, 1883. Writ of error to the U. S. Supreme Court brought into office.

24 In the Court of Common Pleas of Schuylkill County.

FRANCIS W. BOYER *vs.* DANIEL BOYER, JOHN LEAHEY AND A. J. SHORTALL, Commissioners of the County of Schuylkill.	In Equity. May Term, 1883

And, now, 10 April, 1883, the said Francis W. Boyer, plaintiff, appeals to the supreme court of Pennsylvania for the eastern district from the decree of the court of common pleas of Schuylkill county dismissing plaintiff's bill, William Newell and Peter A. McCabe being bail in error as required by law.

Extract from the record.

[SEAL] WM. J. McCARTHY, *Proth'y.*

Filed 4–11–'83.

25 In the Supreme Court of Pennsylvania, Eastern District.
July Term, 1883.

Appeal of Francis W. Boyer from decree of court of C. P. of Schuylkill county.

Assignments of Error.

1. The court erred in dismissing the bill.
2. The court erred in not entering judgment against the defendant upon the demurrer and decreeing the injunction prayed for.
3. The court erred in not holding that national bank stock is not liable to taxation for county purposes.
4. The court erred in not holding that under Sec. 5219 of the Revised Statutes of the U. S., the plaintiff's shares in the Pennsylvania National Bank, an association organized under the national banking act, are not liable to the tax for county purposes referred to in the bill.

20 In the Court of Common Pleas of Schuylkill County, May Term, 1883.

FRANCIS W. BOYER
v.
DANIEL BOYER, JOHN LEAHEY, and A. J. SHORTALL, Commissioners of the County of Schuylkill. } In Equity.

And now, 10 April, 1883, the said Franci. W. Boyer, plaintiff, appeals to the supreme court of Pennsylvania or the eastern district from the decree of the court of common pleas of Schuylkill county dismissing plaintiff's bill.

FRANCIS W. BOYER.

SCHUYLKILL COUNTY, *ss:*

Francis W. Boyer, the above-named appellant, being duly sworn, says that said appeal is not intended for delay.

FRANCIS W. BOYER.

Sworn and subscribed this 10th of April, 1883, before me,
WM. J. McCARTHY, *Prothy.*

21 STATE OF PENNSYLVANIA, } *ss:*
County of Schuylkill, }

I, William J. McCarthy, prothonotary of the court of common pleas of Schuylkill county, do hereby certify that the foregoing is the record and process and all things touching the same so filed and entire as the remain of record in said court sitting in equity wherein Francis Boyer is plaintiff, and Daniel Boyer, John Leahey, and A. J. Shortall, county commissioners, are defendants.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this eleventh day of April, in the year of our Lord one thousand eight hundred and eighty-three.

[SEAL.] W. J. McCARTHY, *Prothonotary.*

22 SCHUYLKILL COUNTY, *ss:*

We, Francis W. Boyer, William Newell, and P. A. McCabe, of the borough of Pottsville, do severally acknowledge themselves to be indebted to the said Daniel Boyer and others, defendants, commissioners, in the sum of fifty dollars, to be levied of our goods and chattels, land and tenements, respectively, and to be void on condition that the said Francis W. Boyer shall prosecute said appeal with effect, and shall pay all costs that may be adjudged against him.

FRANCIS W. BOYER,
WM. NEWELL,
P. A. McCABE.

Taken and acknowledged April 10, 1883, before me—
WM. J. McCARTHY, *Proth'y.*

23 July Term, 1883.

Appeal of Francis W. Boyer.

Appeal from the Court of Common Pleas of the County of Schuylkill. Filed April 11, 1883.

April 16, 1883. Record returned and filed *Eo die.* Assignments of error filed.

April 19, 1883. Argued.

May 21, 1883. The decree of the court below is now affirmed at the costs of the appellant.

Opinion by Gordon, J.

Aug. 20, 1883. Writ of error to the U. S. Supreme Court brought into office.

24 In the Court of Common Pleas of Schuylkill County.

FRANCIS W. BOYER *vs.* DANIEL BOYER, JOHN LEAHEY AND A. J. SHORTALL, Commissioners of the County of Schuylkill.	In Equity. May Term, 1883

And, now, 10 April, 1883, the said Francis W. Boyer, plaintiff, appeals to the supreme court of Pennsylvania for the eastern district from the decree of the court of common pleas of Schuylkill county dismissing plaintiff's bill, William Newell and Peter A. McCabe being bail in error as required by law.

Extract from the record.

[SEAL] WM. J. McCARTHY, *Proth'y.*

Filed 4–11–'83.

25 In the Supreme Court of Pennsylvania, Eastern District.
July Term, 1883.

Appeal of Francis W. Boyer from decree of court of C. P. of Schuylkill county.

Assignments of Error.

1. The court erred in dismissing the bill.
2. The court erred in not entering judgment against the defendant upon the demurrer and decreeing the injunction prayed for.
3. The court erred in not holding that national bank stock is not liable to taxation for county purposes.
4. The court erred in not holding that under Sec. 5219 of the Revised Statutes of the U. S., the plaintiff's shares in the Pennsylvania National Bank, an association organized under the national banking act, are not liable to the tax for county purposes referred to in the bill.

26 5. The court erred in not holding that the taxation alleged in the bill is a violation of the 14th amendment of the Constitution of the U. S., in that it denies to a person within the jurisdiction of the State of Pennsylvania the equal protection of the law.

6. The court erred in not holding that the said taxation is a violation of Art. IX, Sec. 1 of the constitution of Pennsylvania, in that it is not a taxation uniform upon the same class of subjects within the territorial limits of the authority levying the tax.

C. W. WELLS,
Att'y for Appellant.

Filed April 16th, 1883.

27 Appeal from the decree of the Common Pleas of Schuylkill county, argued April 19th, 1883.

THOMAS W. BOYER *vs.* THE COUNTY OF SCHUYLKILL.

Gordon, J.—The argument of the counsel for the plaintiff in error in this case, seems to be but a repetition of that found in Hepburn *vs.* The School Directors, 23 Wal., 480.

It was there urged that no municipal or school taxes could be assessed under the Revised Statutes of the United States upon the shares of the First National Bank of Carlisle, because as was shown all mortgages, judgments, recognizances, and money owing upon articles of agreement for the sale of real estate were, by the State laws, exempted from such taxes. But in answer to this Mr. Chief Justice Waite said "that this was but a partial exemption; that it did not follow that there was not other moneyed capital that was not so exempt, and that it could not have been the intention of Congress to relieve bank shares from taxation merely because
28 some moneyed capital was exempt."

Nor of less force as revealing the intention of Congress, as interpreted by the United States judiciary, is the case of Lionberger *vs.* Rouse, 9 Wal., 468, wherein Mr. Justice Davis, in commenting on the 41st section of the act of Congress of the third of June, 1864, gives it as his opinion, and alleges that it is very clear; that Congress, in conceding to the States the right to tax national banks, adopted a measure which, it was supposed, would restrain them from legislating adversely to those institutions. He says further that this object was accomplished when the States, as far as practicable, so arranged their systems of taxation as to adopt them to the intention thus expressed.

As subsequent decisions of the Supreme Court of the United States in no degree conflict with those cited, we must adopt them as containing a correct exposition of the doctrine of that court upon the subject in hand. But the case of Hepburn *vs.* The School District seems to embody the very contention which we have
29 now before us.

There, as here, it was said, as the State has exempted from

local taxation mortgages, judgments, and other moneyed capital in the hands of individual citizens, therefore, the shares of national banks must in like manner be exempted. But here, as there, we may answer, this exemption, by your own showing, is but partial. Not only is some other moneyed capital of a miscellaneous character taxable for local purposes, but all such capital of the same character as that which you desire to exempt; that is to say, the shares of State banks and savings institutions.

We must, therefore, regard the authorities quoted as settling the principle, that is as long as a State restricts the taxation of national banks to the same kind and degree of taxation that it imposes upon similar capital belonging to its citizens, or its own institutions, it does not discriminate against those banks, and therefore does not violate the provisions of the act of Congress.

30 In this we fully agree with the case of the People *vs.* Weaver, 10 Ot. 539, that no discrimination against the capital invested in national banks can be allowed; if taxed at all, it must be taxed as is like capital of the citizens of the State. But in the case now in hearing, our attention has not been called to any such discrimination as apparent from the laws of the Commonwealth. The general assembly has authorized the taxation of the shares of these banks in no other manner, and at no higher rate, than other capital of a similar character. It is true that certain investments, such as judgments and the like, have been exempted; these, however, are but partial exemptions, and it cannot be justly alleged that either in intention or in effect, is this legislation specially adverse to these banks.

It is certainly true that these exemptions may be carried so far as to indicate a decided legislative preference to other kinds of moneyed capital, and a consequent discrimination against that of national banks. But when this occurs, these institutions can claim exemption, but not till then. As long as they are allowed

31 to stand upon the same footing with the citizen, and similar State institutions in the matter of taxation they have no right to complain.

The decree of the court below is now affirmed at the costs of the appellant.

Filed May 21st, 1883.

32 *Appeal of Francis W. Boyer.*

I, Charles S. Greene, prothonotary of the supreme court in and for the eastern district of Pennsylvania, do hereby certify that the above and foregoing is a true and accurate copy of the proceedings in the above-entitled case, so full and entire as they appear of record in said court.

In testimony whereof I have hereunto set my hand and the seal of said supreme court, at Philadelphia, this 20th day of September, A. D. 1883.

[SEAL.] CHAS. S. GREENE,
Prothonotary.

33 In the Supreme Court of the United States. October Term, 1883.

FRANCIS W. BOYER
vs.
DANIEL BOYER, JOHN LEAHEY, and A. J. SHORTALL, Commissioners of the County of Schuylkill.
} Error to the Supreme Court of Pennsylvania.

Afterwards, to wit: on the second Monday of October, A. D. 1883, came the said Francis W. Boyer, plaintiff in error, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

First. The court erred in dismissing the bill of the plaintiff below and plaintiff in error.

Second. The court erred in not entering a judgment against the said defendants upon the demurrer to the bill in equity filed by the plaintiff, and in not decreeing the injunction prayed for in said bill.

Third. The court erred in not deciding that, under section 5219 of the Revised Statutes of the United States, the plaintiff's shares of stock in the Pennsylvania National Bank, an association organized under the national banking act of the United States and
34 located in the State of Pennsylvania, he the said plaintiff being a resident of Pennsylvania, are not liable to the taxation for county purposes referred to in the bill in equity and to restrain which an injunction was therein prayed for.

Fourth. The court erred in not holding that the taxation for county purposes referred to in the bill in equity is a violation of the *Fourteenth* Amendment of the Constitution of the United States, in that it denies to a person within the jurisdiction of the State of Pennsylvania, the equal protection of the law.

Wherefore the said plaintiff in error prays that the judgment of the said supreme court of Pennsylvania be in all things reversed.

C. W. WELLS,
Att'y and Counsellor for Pl'ff in Error.

[Endorsed:] October term, 1883. Francis W. Boyer *vs.* Daniel Boyer *et al.*, comm'rs. Specifications of error.

Endorsed on cover: Pennsylvania Supreme Court. No. 1162. Francis W. Boyer, plaintiff in error *vs.* Daniel Boyer, John Leahey, and A. J. Shortall, county commissioners of Schuylkill county. Filed 17th October, 1883.

113-689

BRIEF FOR PLAINTIFF IN ERROR.

Supreme Court of the United States.

No. 1162, October Term 1883.

FRANCIS W. BOYER.
Plaintiff in Error.

vs.

DANIEL BOYER, JOHN LEAHEY AND A. J. SHORTALL, *County Commissioners of Schuylkill County,*
Defendants in Error.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

CHARLES W. WELLS,
COUNSEL FOR PLAINTIFF IN ERROR.

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STATEMENT OF THE CASE.

This cause is in this Court upon a Writ of Error to the Supreme Court of Pennsylvania upon its judgment in affirming the decree of the Court of Common Pleas of Schuylkill County dismissing plaintiffs' bill.

The matter involved in this case is the taxation for *County* purposes of ten shares of stock of the Pennsylvania National Bank of Pottsville, Penna.

Francis W. Boyer filed his bill [Page 4 of Record] alleging his ownership of the shares of stock, that defendants were the Commissioners of the County in which the Bank was located and plaintiff resided, that defendants had assessed said shares of stock and were about to levy a County tax upon them and that, under Section 5219 of the Revised Statutes of the United States and the Laws of the State of Pennsylvania, said shares of stock were not taxable for *County* purposes. He prayed for an injunction. The defendants in the bill filed a *general* demurrer, [Record p. 7] praying that the bill be dismissed, which the Court of Common Pleas did, without filing an opinion. The Supreme Court of Pennsylvania affirmed the decree filing an opinion—[Record p. 10].

The plaintiff's claim is that shares of stock in National Banks are not taxable for local purposes in Pennsylvania, because

a.—By Sec. 5219 Revised Statutes of the U. S., the State "taxation shall not be at a greater rate than is assessed upon the moneyed capital in the hands of individual citizens of such State."

b.—Moneyed capital *generally* is not taxable under the Statutes of that State for *local* purposes, but only for State purposes. An exception exists to this statutory rule, affecting an exceedingly small percentage of the total of moneyed capital, but the *rule* is as stated.

c.—That "other moneyed capital" means the *general bulk* of such capital, and that a mere exceptional taxation (either by legislative acci-

dent or intent) of a minute proportion of moneyed capital does not furnish the standard contemplated in the Act of Congress.

The defendant's view, and the one adopted by the Court below, is that so long as the State taxes *any portion* of other moneyed capital it may tax National Bank shares to a similar extent, unless, perhaps, a clear purpose to discriminate against National Bank shares is manifest, and that no such discrimination is apparent from the statutes governing the subject in Pennsylvania.

The Statutes of Pennsylvania, under which this difference arises, are

1. Such as purport to tax National Bank shares for local purposes.

2. Such as show the liability and non-liability of other moneyed property to local taxation.

FIRST. The only Statute in force in Pennsylvania under which National Bank shares may be taxed for local purposes is the Act of 31 March 1870 (P. L. 42—Purd. Dig., 143, pl. 96.)

> "All the shares of national banks, located within this state, and of banks and savings institutions incorporated by this state, shall be taxable for state purposes at the rate of three mills (now four) per annum upon the assessed value thereof; and for county, school, municipal and local purposes, at the same rate as now is or may hereafter be assessed and imposed upon other moneyed capital in the hands of individual citizens of this state."

It will be observed that this statute only purports to tax bank shares as other moneyed capital is taxed, using th same language as that of the Act of Congress (Sec. 5219).

SECOND. The first general statute in Pennsylvania authorizing the taxation of moneyed capital for local as well as state purposes was the Act of 1844, re-enacted, as to state taxation, in the Act of 1881. The Act of 1844 designated many species of moneyed capital as subject to such taxation, but gradually by general laws applicable to the whole Commonwealth, such species were one after another exempted from liability for all local taxation, until nothing substantially remained liable, even nominally, and as we claim nothing was *intended* to remain liable to such local taxation, in consequence of the change in State policy on this subject.

This is apparent from a comparison of the following statutes; the Acts of 1844 and 1881 being printed side by side:

Act of 1844—Purd. Dig. 1380.

All mortgages, money owing by solvent debtors, whether by promissory note, penal or single bill, bond or judgment; also all articles of agreement and accounts bearing interest, owned or possessed by any person or persons whatsoever, except notes or bills for work and labor done and bank notes; also all shares or stock in any bank, institution or company now or hereafter incorporated by or in pursuance of any law of this commonwealth or of any other state or government; and on all shares of stock or weekly deposits in any unincorporated saving fund institution and all public

Act of 1881, P. L. 99.

SEC. 1. All mortgages, moneys owing by solvent debtors, whether by promissory note, or penal or single bill, bond or judgment, also all articles of agreement and accounts bearing interest, owned or possessed by any person or persons whatsoever, except notes or bills for work or labor done and all obligations given to banks for money loaned and bank notes; also all shares of stock in any bank, banking or saving institution or company now or hereafter incorporated by or in pursuance of any law of this Commonwealth, and all public loans or stocks whatso-

loans or stocks, whatsoever, except those issued by this commonwealth, and all money loaned or invested on interest in any other State; also all household furniture &c. * * * * shall be valued and assessed and subject to taxation for the purposes in the act mentioned [payment of interest on the State debt] and for all State and County purposes whatsoever.

ever, except those issued by this Commonwealth or the United States, and all money loaned or invested in any other State, and all other moneyed capital in the hands of individual citizens of this State, shall be and are hereby taxable for State purposes at the rate of four mills on the dollar of the value thereof annually: *Provided*, that all mortgages, judgments and recognizances whatsoever, and all moneys due or owing upon articles of agreement for the sale of real estate shall, after the passage of this Act, be exempt from all taxation except for State purposes: *Provided*, the provisions of this act shall not apply to building and loan associations: *Provided, however*, that moneys loaned by building and loan associations shall be subject to tax the same as money loaned by individuals. [This clause repealed by Act 22 May 1883, P. L. 38]

SEC. 2. That hereafter all corporations paying interest on a loan or loans which are taxable for State purposes, whether secured by bond, mortgage, recognizance or otherwise, shall report annually, in the month of November, to the Auditor General, the amount of such indebtedness owned by residents of this Commonwealth, as nearly as can be ascertained, under oath of the president or treasurer, and shall pay into the State treasury four mills upon every dollar of such indebtedness so returned and owned by resi-

> dents as aforesaid within fifteen days after the thirty-first of December in each year; and for every failure to report or pay as aforesaid the Auditor General shall add ten per centum as a penalty to the said tax, and the said tax may be deducted by the corporation paying the same from the interest on such indebtedness; whereupon *such indebtedness*, whether secured by bond, mortgage, judgment or otherwise *shall be exempt from other taxation* in the hands of the holders thereof.

Thus it will be seen that by this Act (and there is no other exception, Act of 1870, *ante*) there were *eleven* species of moneyed capital made subject to taxation for county purposes, to wit: (1.) Mortgages, (Money owned by solvent debtors, whether by), (2) Promissory note, (3) Penal or single bill, (4) Bond or (5) judgment, (6) articles of agreement and accounts bearing interest, (7) shares of stock in State Banks, (8) shares of stock in other corporations, (9) shares of Stock and weekly deposits in any unincorporated saving fund institution, (10) Pub lic Loans, and (11) money loaned or invested in other States.

Taking these up in their order we see how many of these eleven species of property have been relieved since 1844 from liability to County taxation and how little remains, if any, subject thereto.

1. Mortgages.

> Excepted from local taxation by Sec. 1 of Act 1881, *ante*. "All mortgages * * shall after the passage of this act, be exempt from all taxation except for state purposes.

2. **Promissory Note.**
3. **Penal or Single Bill.**

"Notes or bills for work or labor done and bank notes" exempted by Act 1844, *ante*.

If in judgment, mortgage or recognizance, exempted by Act 1881, *ante*—"All mortgages, judgments, and recognizances whatsoever shall be exempt from all taxation except for State purposes."

Notes or bills to National Banks exempt by operation of National Banking Act.

4. **Bonds.**

Railroad Bonds exempted by Act 1854 (P. L. 535, Purd. Dig. 1369),—"All bonds or certifi-"cates of loans of any railroad company incor-"porated by this Commonwealth be and the "same shall be liable to taxation for state pur-"poses only."

All Corporation bonds and obligations exempted from local taxation by Sec. 2, Act 1881, *ante*.—"All corporations paying interest on a "loan or loans which are taxable for state pur-"poses, whether secured by bond, mortgage, "recognizance or otherwise, shall report for "state taxation, and such indebtedness * * * shall "be exempt from other taxation in the "hands of the holders thereof."

All other bonds, if in judgment, mortgage or recognizance, or if given to National Banks, are exempt, as *ante*, **2**, **3**.

5. Judgments.

Exempted by Sec. 1, Act 1881, ante—"All * * judgments shall be exempt from all taxation except for state purposes."

6. Articles of Agreement and Accounts bearing Interest.

When given for sale of real estate exempted by Act 1881, *ante*.

When given by corporations exempt under Sec. 2, Act of 1881, *ante*.

When secured by judgment, mortgage or recognizance, or given to National Banks, exempt as *ante*, **2, 3**.

7 Shares of Stock in State Banks.

Shares of stock in State Banks created since the General Banking Act of 1850, (and of the very few State Banks remaining in Penna., nearly all are such), are not subject to local taxation. Act 1852, P. L. 443.

Allegheny Co. vs. Shoenberger. 1 Grant (Pa.) 35.

"Shares of bank stock are not subject to taxation for county purposes, the only mode of taxing bank stock is that presented by the 21st sec. of the Act of 1850, imposing a tax on dividends only." Supreme Court of Pa., Lowrie, J.

This statement is made subject to the effect of the Act of 1879, *ante* page ; but it will be observed that that Act places shares in State banks in the same category as those in National Banks, i. e., makes them both taxable as "*other* moneyed capital" is taxable. So to ascertain whether State bank shares, as well as National bank shares, are taxable we must first ascertain whether moneyed capital "other" than State bank shares is taxable.

8. Shares of Stock in Other Corporations.

As set out on the Bill [Record p. 5] the Act of 1868 (P. L. 1318) provided that the shares of stock held by any stockholder in any company, which in its corporate capacity is liable to and pays into the State treasury taxes on capital stock, shall not be liable in the hands of said stockholder personally for county or local taxation.

Sec. 3 of the Act of 1879, P. L. 112, makes "every company or association whatever, incorporated" &c. * * "except foreign insurance companies, banks and savings institutions" "subject to pay into the treasury of the Commonwealth annually a tax" on its capital stock.

Hence it results that the *shares* of stock of every incorporated company, excepting foreign insurance companies, banks and savings institutions, are exempt from local taxation,

amounting in the aggregate in the State in 1881, as shown by the Bill [Record p. 5 *a.*] to $564,000,000.

9. Shares of stock and weekly deposits in unincorporated saving fund institutions.

It is very questionable whether there is now existing in the State such a thing as an *un*incorporated saving fund institution. It will be observed that in the re-enactment in 1881 of the original Act of 1844 the legislature omitted this species of property, doubtless for the reason that they recognized the fact that it no longer existed in this State.

10. Public Loans.

Those issued by this Commonwealth are excepted by the original Act of 1844—"excepting those issued by this Commonwealth." The loans of the United States are exempt from all State taxation, by the operation of the U. S. Constitution.

11. Money loaned or invested in other States.

This sort of capital is doubtless always secured by mortgage or judgment and is therefore exempted from local taxation by the Act of 1881, *ante*,—"all mortgage judgments and negotiations whatsoever shall be exempt from all taxation except for State purposes."

It will be observed that all of the preceding exemption laws are general in their operation to the whole Commonwealth and not special as to any particular locality.

The practical result of this legislation clearly illustrates our contention that the vast bulk of moneyed capital is exempt from local taxation, as is shown below.

The *machinery* for the assessment of taxes in Pennsylvania is this:—the County Commissioners issue their precepts to the various assessors in the County commanding them to assess and value all property of the nature described in the precept, including for State purposes *inter alia* the eleven species of moneyed property mentioned in the Acts of 1844 and 1881, *ante*. The assessors are duly sworn. Upon the return of these precepts to the County Commissioners it is their duty, triennially, to transmit to the State board of Revenue Commissioners sitting at Harrisburg "a statement under oath of the return made by the assessors of the value in the aggregate of all property liable to State tax." (Act 1878 P. L. 126.) This Board thereupon equalizes the valuation of the property returned among the various counties and commands the County Commissioners to collect the tax thereupon for the use of the State, which they then do, together with the county tax. Hence we have an authentic source of information as to the gross valuation of all the species of moneyed property taxable in Pennsylvania under the Acts of 1844 and 1881, to wit: in the sum of the returns of the County Commissioners to the Revenue Commissioners.

A very recent case in the Supreme Court of Penna. (Com'th, vs. Lehigh Valley R. R. Co., 13 Weekly Notes, 469) holds that the return to the Revenue Commissioners "must be presumed to be full and true and to include all objects taxable by law." It is true that this return is for *state* taxation, but it includes every species of moneyed cap-

ital possibly taxable for county purposes, besides very many that are not; the return includes *all* (but one—stocks) subjects of taxation embraced originally within the Act of 1844, and whilst many exemptions have been made from county taxation none has been made from state taxation.

The pleadings in this case [Record p. 5 *b*] show that by these returns

> "All mortgages, money owing by solvent debtors, whether by promissory note, penal or single bill, bond or judgment, also all articles of agreement and accounts bearing interest, owned or possessed by any person or persons whatsoever (except notes or bills for work or labor done and all obligations given to banks for money loaned and bank notes) and all public loans or stocks whatsoever, except those issued by this State or the United States, and all moneys loaned or invested on interest in any other State and all other moneyed capital in the hands of individual citizens of the State," amount to $ 74,931,765

This sum includes all mortgages, judgments, moneys due upon articles of agreement for the sale of real estate, clearly exempted from taxation for local purposes, the exact valuation of which this case does not show, but the amount must run into millions of dollars.

The Record (page 5, *c*) *does* show, however, the valuation of the corporate loans included with said return, and clearly exempted from County taxation by the Sec. 2, of Act of 1881, *ante*, amounting to $51,404,162.

Deducting these two items from the total of $74,931,765 above we have a balance, approximately, of $ 10,000,000
possibly taxable for county purposes; but deducting only the corporate loans, the amount of which is definitely known, we have only the sum of $ 23,527,603
as moneyed capital taxable for local purposes within the State of Pennsylvania.

On the other hand we have a total of moneyed capital *exempted* from local taxation, so far as shown by this case, as follows:

Corporate stocks (*ante*, *No.* 8)	$564,000,000
Corporate loans " *No.* 4, and as above	51,000,000
	$615,000,000

To this known total we should add the value of mortgages, judgments, real estate agreements, many millions more.

The net result of which is that not more than $23,000,000 of moneyed capital is *taxable* for local purposes in Pennsylvania (and probably not ten millions), whilst we have over $600,000,000 expressly *exempted* from such taxation, or say at the highest, 4 pr. ct. is taxable whilst 96 pr. ct. is exempt, though probably, from the preceding statements, the correct statement would more likely be 1 pr. ct. taxable and 99 pr. ct. exempt.

The legislative intent we believe to be that moneyed capital shall not be taxable at all for local purposes, but only for state revenues. Originally when the Act of 1844, *ante*, was passed it was the policy of the State to tax moneyed capital as well for local purposes as for State—that Act so provides. It was likewise legislative policy then to tax real

estate alike for both purposes. But since then this policy has been changed, and now corporation capital money at interest and the moneyed capital seems to have been selected as the chief sources of State income, real estate being excluded from State taxation but left to the local authorities for their revenue.

Shortly after the passage of the Act exempting real estate from State taxation (1866), came the Act of 1868, *ante*, exempting from local taxation the shares of stock of all corporations paying into the State treasury the tax on capital stock, and as *all* corporations, except banks and savings institutions, were by law liable to pay this tax into the State treasury, *all* corporation shares were exempted from local taxation in the hands of the individual citizens, bank shares having been exempted by Act of 1852, P. L. 443, as was held in Allegheny *vs.* Shoenberger, Grant 35. Next came a whole host of local special statutes exempting from local taxation in most of the counties of the State all mortgages, judgments and recognizances whatsoever, and moneys due or owing upon articles of agreement for the sale of real estate, until finally the Legislature made this exemption general throughout the State by the Acts of 1879 and 1881. The last sweeping stroke was given by the second section of the Act of 1881, (P. L. 99) by which all corporation loans upon which interest is paid, whether secured by bond, mortgage, judgment or otherwise, were exempted from local taxation in the hands of the holders thereof. Railroad bonds had already been exempted by Act of 1854 (P. L. 535, Purdon 1369, pl. 81) and notes or bills for work or labor done, obligations to banks and bank notes, as well as the loans of the U. S. and of this State, were excluded by the terms of the original Act of 1844 from its operation.

This leaves of moneyed capital subject to local taxation but a shadow and shows the clear intent, as we take it, of

the legislature to exclude moneyed capital from among the subjects of local taxation and to retain it as its own peculiar source of revenue.

An important fact to be considered in the argument, is that the total capital invested in Banking in Pennsylvania is the sum of $64,613,791, of which $7,161,740, or 11 per cent. of the whole is the capital of State banks, whilst $57,452,051 or 89 per cent is the capital of the National Banks of the State. [Record p. 6.]

THE ERRORS ASSIGNED. [Record p. 12.]

FIRST. The Court erred in dismissing the bill of the plaintiff below and the plaintiff in error.

SECOND. The Court erred in not entering a judgment against the said defendants upon the demurrer to the bill in equity filed by the plaintiff and in not decreeing the injunction prayed for in said bill.

THIRD. The Court erred in not deciding that, unde section 5219 of the Revised Statutes of the U. S., the plaintiff's shares of stock in the Pennsylvania National Bank, an association organized under the National Banking act of the U. S., and located in the State of Pennsylvania, he the said plaintiff being a resident of Pennsylvania, are not

liable to the taxation for county purposes referred to in the bill in equity and to restrain which an injunction was therein prayed for.

FOURTH. The Court erred in not holding that the taxation for county purposes referred to in the bill in equity is a violation of the Fourteenth amendment of the Constitution of the U. S. in that it denies to a person within the jurisdiction of the State of Pennsylvania the equal protection of the law.

ARGUMENT.

This case turns upon the meaning of the phrase "other moneyed capital" in Section 5219 of the Revised Statutes of the United States, which reads as follows:

> "Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of National Banking associations located within the State, subject only to two restrictions, *that the taxation shall not be at a greater rate than is assessed upon other moneyed capital*

> *in the hands of individual citizens of such State*, and that the shares of any National Banking association owned by non-residents of any State shall be taxed in the city or county where the bank is located and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county or municipal taxes, to the same extent, according to its value, as other real property is taxed."

The sole question of law in this case then is this: Where the *great bulk* of "other moneyed capital in the hands of individual citizens of the State" is not taxable for County purposes, and a very small proportion only is taxable for such purposes, can the County impose a tax upon shares of National Bank stock?

In other words, is the "very small proportion" of four per cent., which is liable to such taxation in Pennsylvania, to be regarded as the "other moneyed capital" within the meaning of the Act of Congress as furnishing the standard for the taxation of National Bank shares, or is it the "great bulk" "of ninety-six per cent., which is not taxable, that is to be so regarded. We claim it is the latter—we claim that the language and the purpose, the words and the spirit, of the Act go to show that it is the rule applicable to the *mass* of moneyed capital which is to determine the taxability of National Bank shares, and that that liability to taxation is not to be ascertained by the taxation, or the exemption from taxation, of any comparatively small portion of such moneyed property.

It seems to be manifest that, from the words "other moneyed capital," we are to gather the intent of Congress to have been, not that "*all* moneyed capital" or "*any* mon-

eyed capital" was to form the standard, but that we should look at the general bulk of moneyed capital in the hands of the individual citizens of the State and if we find that the State authority has taxed that bulk generally, then that National bank shares may be similarly taxed—that we are not to regard the exception from the rule of taxation as creating the standard, for such would be to put the lesser above the greater, nor are we, upon the contrary, to regard the exception from the rule of non-taxation as warranting the State in taxing National bank shares to the extent imposed upon that exceptional property. Words taken in their ordinary acceptation do not convey such a strained meaning. The natural thought, in looking at this phraseology, in the attempt to apply it practically, is that it is the *rule*, and not the *exception*, which is to govern. And this we will find later on has been the construction heretofore put upon this language by the Supreme Court of the United States.

But the better source from which to draw the meaning of the legislator is undoubtedly in the purpose which actuated him in the creation of the law under consideration, if that purpose can be ascertained. Happily, in this matter now under consideration that purpose, that intent, is manifest upon the face of the subject, and we are further instructed as to that purpose by the utterances of this Court.

Indisputably that purpose was *protection*—protection to the creature of the National government against discrimination by the State government in favor of other capital of like quality—of the moneyed capital—as against the capital invested by the citizen in the National Bank. Congress well remembered the previous experiment of the United States in the establishment of a National Bank and the antagonistic efforts of the States to tax that bank, oppressively and almost destructively, and therefore wrote upon

the face of the law the distinct limit beyond which the power of state taxation should not go. That limit was the one of *equality*. So far as you tax the real estate and the moneyed capital of your citizens, said the Congress to the States, you may tax the real property and the shares of the capital stock of the National Bank within your limits. The real estate of the bank may be made to bear its proper and equal burden of the State—equal with other real estate of a like value—the shares of stock shall do likewise as compared with other moneyed capital of the citizens of the State. Can it be said with any show of fairness that that taxation would be equal which taxed the real estate of the National Bank and that of its next door neighbors (at equal *rates*, if you please,) and yet exempted all other real estate within the taxing district? Within the Commonwealth of Pennsylvania real estate is not now taxable for State purposes. Can it be possible that an enactment imposing a State tax upon the real estate of all National Banks and say that of all lawyers, but still leaving all other real estate untaxed, could be said to be a compliance with the requirements of the Act of Congress? Such an enactment would violate most plainly and offensively all proper ideas of equality, and there can be no doubt that this court would hold it to be invalid. Yet the phrase as to real estate is precisely the same as that which relates to the shares of stock in the bank—"other real property," "other moneyed capital."

Under the "equality and uniformity" clause in the several State constitutions no case has gone so far as to hold that the taxation of a portion of a class of subjects could be maintained merely because the same taxation was imposed upon *some* others of the same class, the great mass of the class not being subject to the taxation. The Courts of some States have gone very far in holding to the power of the Legislature to classify subjects in imposing taxation, and we think

that in some instances those decisions have practically nullified the just purposes of the constitutional clause referred to, but yet all have insisted with the utmost clearness and positiveness that the taxation must be equally imposed upon all subjects in the class; not that there may not be an exception, possibly, to that taxation, but that the rule of taxation must be uniformly imposed upon the great bulk of those who compose the class.

In the matter under consideration Congress created the classes. Real estate and moneyed capital constituted the two classes, upon which the State Government might impose taxation, and in which the National Banks might be included. *Their* real estate was part of the class "real property," *their* shares were part of the class "moneyed capital," and the "*other* real property" and "*other* moneyed capital" were those entire classes, less (or "other") the portion belonging to the National Banks.

But if the purpose of Congress was to prevent adverse discrimination by the State against the National Bank and that purpose was to be carried into effect by the requirement of equality, let us consider briefly the consequence if the State legislation under consideration can be maintained.

The language of Mr. Webster and of Chief Justice Marshall in McCollough *vs.* Maryland that the power to tax involves the power to destroy has now become an axiom which none reject; and therefore in considering the power of a State as to the subject of taxation we have nothing to do with the extent to which the State has actually exercised that power, we are to regard it simply as if the State had exercised its full power and had destroyed, or sought to destroy, the thing to be taxed. So that any argument based upon the want of actual injury to the subject is a fallacious one and will be disregarded by the Court, the

question being one of power, and hence not what has been, but what may be, done under it.

Now, it is doubtless true that the tax actually imposed in the State of Pennsylvania for county purposes upon National Bank shares, and about which we now complain, is not in itself an oppressive one. If, however, it be illegal, it is unjust and ought not to be paid; if it be legal it *may* become oppressive and eventually destructive. Suppose the State were to tax the four per cent capital, now subject to local taxation, at ten or twenty per cent. a year and were to impose a like tax upon the shares of National Bank stock, at the same time exempting the other ninety-six per cent. from any taxation. Can there be any question that the effect of such taxation would be to entirely exclude National Banks from our State—to destroy the subject within our territory—and that, whilst the same fate would doubtless be that of the four per cent. of other moneyed capital taxed, yet that the exempted ninety-six per cent. would flourish. If such is not discrimination, adverse and destructive to the National Banks, then it is impossible to conceive of such a thing as discrimination, and we submit that if this is not a violation of the purpose of Congress in the provision under consideration then it is impossible to violate it.

But it has been suggested that the phrase "other moneyed capital" means "other moneyed capital *which is taxed*;" that the discrimination intended to be prevented by the statute is that between the subjects actually taxed by the law of the State, and that so long as taxation on National Bank shares is the same as that imposed upon the other subjects taxed the law of coupons is not violated no matter how much property of the same quality may be exempted. Upon the face of this statement some plausibility

may appear, but we submit that the position is an incorrect one. If it be illegal to tax other moneyed capital at say one per cent. and National Bank shares at two per cent., because of adverse discrimination, that discrimination is certainly more apparent, as is certainly more real, if the National Bank shares be taxed at two per cent. and the other moneyed capital at nothing. It is not the names by which things are called, but the effect rather from which we are to determine their quality and their legality. How easy it would be for a State to expel the National Banks from their territory, if this view were the correct one, by taxing some insignificant stock at a rate practically destructive, imposing the same rate upon National Bank shares and exempting all the rest of moneyed capital. For example, the actual value of the capital stock of the canals within the territory of Pennsylvania is about four millions. May the legislature impose a tax of ten per centum upon that stock and on National Bank shares and exempt the thousand million dollars worth of other money capital, and yet, although to do so would extinguish both canal and bank stock, can we say that there is no discrimination in this, because, forsooth, all property that is taxed at all is taxed alike? Such would be a mere play upon words and a mockery of justice.

We present to the Court that the only fair interpretation of the Act of Congress is the one suggested by the plaintiff in this case, one eminently just to the States, as well as to the National Banks, and one avoiding all possibility of conflict between the National and State sovereignties; that is to say, whatever is the rule of taxation as to the body of other moneyed capital, that shall be the rule as to Bank shares, and that the exception to the rule, whether that exception be to exempt or to tax, shall not be the standard of taxation of National Bank shares.

Upon authority

No case can be found in the books raising precisely the same question as is raised in the case at the bar. In several cases the subject has been under discussion by the Supreme Court of the United States, but always in cases where *taxation* of other moneyed capital *was the rule* and *exemption was the exception*, whereas, here the fact is precisely the opposite, *exemption* is *the rule* and *taxation the exception.*

The leading case, and the one upon which the Court below rested their decision, is the case of

Hepburn vs. School Directors of Carlisle,
23 Wallace, 480.

This case originated in Pennsylvania and is reported as Gorgas' Appeal, 29 Smith 150, and School Directors *vs.* Hepburn, *ibid* 160. It was claimed that National Bank shares were not subject to school tax, because of the special Act of Assembly, exempting from taxation in Cumberland County "all mortgages, judgments, recognizances, and money owing upon articles of agreement for the sale of real estate." Graham, J., in the Common Pleas [the Supreme Court affirmed on his opinion], held to the contrary, and on page 150 and 151, said:

> "The Act of 1846 makes it the duty of the assessor to require each person to deliver to him a statement showing the aggregate amount of money due and owing by solvent debtors to such persons, etc., [as classified on page .] This includes every imaginable sort of kind of capital and was taxable for county purposes until the Act of 1868 (local to Cumberland County). This act provides that all mort-

> gages, etc., shall be exempt from all taxation as to State purposes. * * * The plaintiff's counsel contend that by the provisions of this Act there is moneyed capital exempt from all taxation except for State purposes, and consequently that the Act of Congress which provides that the shares of National Banks shall not be taxed by a State at a greater rate than is assessed upon other money capital, exempt National Bank shares, from all taxation, except for State purposes. But I do not think this is a reasonable construction of the Act of Congress. "When the Act of Congress restricts the rate of taxation so that it shall not be at a greater rate than that upon other moneyed capital in the hands of individual citizens of such State, the intention of Congress was to prevent the shares of National Banks from being taxed at a greater rate than other moneyed capital was taxed by the *general laws* of the State taxing this kind of property. It was not intended that, if a State *excepted some particular items* of moneyed capital from taxation, leaving every other imaginable sort and kind subject to taxation under the general laws taxing moneyed capital, the shares of National Banks should come within the exception and not within the general rule."

This case was removed to the Supreme Court of the United States, and the judgment here affirmed— (23 Wallace, 480),—His Honor, the Chief Justice, delivering the opinion. In disposing of a preliminary point, he said :

> "We cannot concede that money at interest is the only moneyed capital included in that

term as here used by Congress. The words are "other moneyed capital." That certainly makes stock in these banks moneyed capital, and would seem to indicate that other investments in stocks and securities might be included in that descriptive term."

"It is next insisted that no municipal or school-tax could be assessed upon the shares of the First National Bank of Carlisle, a National Bank located within the Borough of Carlisle, because, by the laws of Pennsylvania, as is claimed, other moneyed capital in the hands of individual citizens at that place is exempt from such taxation. In support of this claim it is shown that all mortgages, judgments, recognizances, and moneys owing upon articles of agreement for the sale of real-estate, are exempt from taxation in that borough, except for State purposes. This is a *partial* exemption only. It was evidently intended to prevent a double burden by the taxation, both of property and debts secured upon it. Necessarily there may be other moneyed capital in the locality than such as is exempt. If there is, moneyed capital as such is not exempt. *Some part of it only is.* It could not have been the intention of Congress to exempt bank shares from taxation because *some* moneyed capital was exempt."

The case of Hepburn *vs.* School District is commented upon by the Circuit Court of the U. S. in

City National Bank vs. Paducah,
1 Thomp. N. B, cases 300

"In the case of Hepburn vs. School Directors

it was held that the exemption of small amounts of moneyed capital, in particular cases, would not invalidate the tax, if the great body of money capital was subjected to it. However, the amount exempted was small in proportion to the aggregate amount of moneyed capital, and the great mass of moneyed property was subjected to the same tax levied upon the shares of National Banks."

The Court below in the present case rested its judgment upon the case of Hepburn.

GORDON, J.,—[Record p. 10] said: "The case of Hepburn vs. The School District seems to embody the very contention which we have now before us. There, as here, it was said, as the State has exempted from local taxation mortgages, judgments, and other moneyed capital in the hands of individual citizens, therefore, the shares of National banks must, in like manner be exempted. But here, as there, we may answer, this exemption, by your own showing, is but partial. Not only is some other moneyed capital of a miscellaneous character taxable for local purposes, but all such capital of the same character as that which you desire to exempt; that is to say, the shares of State banks and saving institutions.

We must, therefore, regard the authorities quoted as settling the principle, that so long as a State restricts the taxation of National banks to the same kind and degree of taxation that it imposes upon similar capital belonging to its citizens, or its own institutions, it does not discriminate against those banks, and, therefore, does not violate the provisions of the Act of Congress.

> In this we fully agree with the case of the People v. Weaver (10 Otto, 539), that no discrimination against the capital invested in National banks can be allowed; if taxed at all, it must be taxed as is like capital of the citizens of the State. But in the case now in hearing, our attention has not been called to any such discrimination as apparent from the laws of this Commonwealth. The General Assembly has authorized the taxation of the shares of these banks in no other manner, and at no higher rate than other capital of a similar character. It is true that certain investments, such as judgments and the like, have been exempted; these, however, are but partial exemptions, and it cannot be justly alleged that either in intention or in effect is this legislation specially adverse to these banks.
>
> It is certainly true that these exemptions may be carried so far as to indicate a decided legislative preference to other kinds of moneyed capital, and a consequent discrimination against that of Naional banks. But when this occurs, these institutions can claim exemption, but not till then. As long as they are allowed to stand upon the same footing with the citizen, and similar State institutions, in the matter of taxation, they have no right to complain."

A respectful criticism of the Court below shows, we beg leave to say, that the case of Hepburn is totally dissimilar from the present case. *There* the contention was, so Judge Graham said (ante p. 23), that because there was some moneyed capital exempt, therefore bank shares were exempt, although moneyed capital generally was taxed; *here* we contend that, because moneyed capital generally is exempt, bank shares are exempt, though some capital be taxed. *In*

that case it was contended that "if a State excepted some particular items of moneyed capital from taxation, leaving every other imaginable sort and kind subject to taxation under the general laws taxing moneyed capital," then National Bank shares should also be exempt, but the Court well put it in saying that the banks should not come within the exception, but should come within the general rule. In this case we contend that bank shares should be governed by the general rule applicable to moneyed capital and not be governed by the exception. In the language of Chief Justice Waite "that was a partial exemption only. * * Some part of moneyed capital only was exempt." *This* case is one of partial and very slight taxation only—some part only (and a very small part only) is taxed, whilst the moneyed capital generally is exempt.

In other words, instead of that case "embodying the very contention before us," the two cases are the exact opposites of each other so far as the contention is concerned; and yet we believe that case does lay down the doctrine which governs this one, to wit: That it is the *rule* as to taxation or exemption which is to govern and not the exception.

Another proposition of the Court upon which much stress is laid, is that the taxation now in question is "in no other manner and at no higher rate than other capital of a similar nature," to wit: that of shares of State banks, and that, therefore, the provision in the Act of Congress is not violated, the part construing "other money capital" to mean "moneyed capital of other banks."

There is some force in this argument, but we believe when the subject is fully viewed it too will be seen to be fallacious. We shall examine it later on in this argument.

The following cases have a bearing on the question in hand and ought to be considered:

Lionberger vs. Rouse, 9 Wallace 468, was this:

The State of Missouri had in 1857, by a binding contract disabled itself from taxing certain banks. After the creation of the National banking system, two only of these State banks remained in existence, and a State law was passed in 1864 imposing upon the shares of National banks and other State banks (than the two referred to) a rate higher than upon these two. These two had a very inconsiderable part of the banking capital of the State.

The case arose whilst the National Banking Act still contained the proviso as to state taxation that it "shall not exceed the rate imposed upon the shares in any of the banks organized under the authority of the state where such association is located." It was conceded that the tax imposed upon the National Bank shares was not greater than was assessed on other moneyed capital belonging to individuals and corporations, but it was claimed that it was higher than that imposed upon the shares of state banks and therefore void under the proviso just quoted. *Held*, not to create an exemption of National Bank shares.

> DAVIS, J: "According to the words of the law, the tax was not warranted, but did Congress intend that the law should have such an effect? Did it contemplate that the shares of National banks should escape taxation, if the State complied, *so far as it had the ability to do so*, with the requirements of the act?
>
> It is very clear that Congress, in conceding to the States the right to tax, adopted a measure which it was supposed would operate to restrain

> them from legislating adversely to the interest of the National banks. The measure itself had reference to prospective legislation by the States, and its object was accomplished when the States conformed, so far as practicable, their revenue systems to it. Exact conformity was required if attainable, but the law-making power did not intend so absurd a thing as that the power of the State to tax should depend on its doing an act which it had obliged itself not to do. It was well-known that States by contract could grant away the right of taxation and that this power had repeatedly been exercised. If the construction contended for be allowed, then a State so unfortunate as to have a single bank whose shareholders are exempt by contract from taxation in the manner provided by Congress, can derive no benefit from the power given by Congress to tax the shares of National banks. The Court will not impute to Congress a purpose that would lead to such manifest injustice."

It will be observed again that this Court simply held that an exception to the rule of taxation (and in this case the exception was a very trifling one) would not work an exemption in favor of National bank shares, though the Court intimate that even *exact* conformity was required if in the *power* of the State.

But the case approaching the nearest to the present one is

City National Bank vs. *Paducah*,

1 Thompson's N. B. Cases, 300,

decided in the U. S. Circuit Court for the Sixth District, in 1877.

After reciting Section 5219 of the Revised Statutes of the U. S. now under discussion,

> BROWN, J., said: "While the section in question would not be open to construction if the entire moneyed capital of the State, in the hands of individuals, were taxed at a uniform rate, the interpretation to be put upon it, where different rates of taxation are imposed upon different classes of moneyed capital, is not free from doubt. Has the State a right to tax the shares of National Banks at the highest rate imposed upon any class of moneyed capital, regardless of the proportion which that class bears to other classes?
>
> On the other hand, is it confined to the lowest rate imposed upon any class of moneyed capital with like disregard of the relative amount of the different classes? The last question is answered directly by the case of Hepburn vs. School Directors, 23 Wall 480, in which it was proved that mortgages, judgments, recognizances, and moneys owing upon articles of agreement for the sale of real estate were exempt from taxation in a certain district, except for State purposes. This was held a *partial* exemption only, and it is said "it cannot be the intention of Congress to exempt Bank shares from taxation because some moneyed capital was exempt."
>
> *Suppose, however, there were in a certain district a very small amount of moneyed capital of one species and a very large amount of another; that the former was heavily taxed, and the latter exempt altogether, would the municipality be authorized to tax the shares of the National Banks at the rate imposed upon the former?* Suppose for example, that State Banks, exempted from

> taxation, absorbed three fourths of the other moneyed capital" of a certain city, and the "other one-fourth was heavily taxed would it be not only an unjust discrimination, but a mere evasion to tax the shares of the National Banks at the rate imposed upon the taxed quarter? These questions have never been settled definitely, but bearing in mind that the obvious intention of Congress was to permit taxation, but to inhibit unjust discrimination, it would seem that the answer would be easy."

Adams vs. The Mayor of Nashville, 95 U. S. 19.

In that case it was claimed that the shares of National banks in Nashville were not subject to local taxation, because, by an ordinance of that city it was provided that certain bonds issued by the city should be exempt from taxation, and it was said that the complainant's shares of National bank stock were taxed at a greater rate than that imposed on such bonds, and that, therefore, the taxation of his shares was illegal.

The Court, by Mr. Justice Hunt, disposed of this position by saying, *First*, that the *fact* of exemption of the bonds was denied in the pleadings, that *Second*, the exemption had been repealed, and that, *Third*, it was a case similar to Hepburn *vs.* School Directors, *ante*.

> "There, as here, it was objected that this exemption by relieving certain specified property from taxation brought the case within the prohibition of the Act of Congress. This Court held otherwise. The Act of Congress was not intended to curtail the State power on the subject of taxation. It simply required that capital invested in National banks should not be taxed at a

> greater rate than property similarly invested. It was not intended to cut off the power to exempt particular kinds of property if the Legislature chose to do so. Homesteads to a specified value, a certain amount of household furniture (the six plates, six knives, etc., of the old statutes), the property of clergymen, to some extent, school-houses, academies and libraries are generally exempt from taxation. The discretionary power of the States over all these subjects remains as before the Act of 1868. The plain intention of the statute was to protect the corporations formed under it from an unfriendly discrimination against them of the power of State taxation. That *particular persons* or *particular articles* are relieved from taxation is not a matter to which either class can object.

Hence the case is only another instance of the rule that an exceptional exemption is not the thing prohibited by Congress, but that it is a general exemption only. This we claim is the fact here.

The two cases of

People vs. Weaver, 100 U. S. 539, and

Cummings vs. Merchants' National Bank, 101 U. S. 153,

are the same in principle precisely with the case now before the Court. In each of them the discrimination was against National Bank shares, together with a small portion of other moneyed capital, to wit: State bank shares, in favor of the great bulk of moneyed capital, and in each case this Court held the discrimination illegal and void.

People vs. Weaver was as follows:

The law of New York, of 1850, provided that in assessing against any individual his personal estate, including corporate stock, the assessor should deduct the just debts of such individual; the Statute of 1866 providing for the assessment of bank shares—National and State—failed to provide for the deduction of debts as in the case of other moneyed capital. The Court of Appeals of that State having ruled that the Act of 1850 did not extend to bank shares, the question was whether the taxation upon the *whole* value of the relator's National Bank shares, without deducting his debts, was unauthorized by the Act of Congress, as being a discrimination in favor of "other moneyed capital."

The United States Supreme Court held that it was, and that the tax could not be imposed upon National Bank shares.

> Mr. Justice Miller, said: "It cannot be disputed that the effect of the State law is to permit a citizen of New York who has moneyed capital invested otherwise than in banks to deduct from that capital the sum of all his debts, leaving the remainder subject to taxation, while he whose money is in shares of bank stocks can make no such deduction. Nor can it be denied that, inasmuch as nearly all the banks in this State and in all others are National Banks, the owner of such shares who owes debts is subject to a heavier tax on account of those shares than the owner of moneyed capital otherwise invested who also is in debt, because the latter can diminish the amount of his tax by the amount of his indebtedness, while the former cannot. That this works a discrimination against the National bank shares as subjects of taxation unfavorable

to the owners of such shares, is also free from doubt. The question we are called upon to decide is whether Congress, in passing the Act which subjected these shares to taxation, by the State, intended by the very clause which was designed to prevent discrimination between National Bank shares and other moneyed capital, to authorize such a result.

As Congress was conferring a power on the States which they would not otherwise have had, to tax these shares, it undertook to impose a restriction on the exercise of that power, manifestly designed to prevent taxation which should discriminate against that class of property as compared with other moneyed capital. In permitting the States to tax these shares it was foreseen that the States might be disposed to tax the capital invested in these banks oppressively.

This might have been prevented by fixing a precise limit in amount. But Congress with due regard to the dignity of the States, and with a desire to interfere only so far as was necessary to protect the banks from anything beyond their equal share of the public burdens said, you may tax the real estate of the banks as other real estate is taxed, and you may tax the shares of the bank as the personal property of the owner, to the same extent you tax other moneyed capital invested in your State. It was conceived that by this qualification of the power of taxation equality would be secured and injustice prevented."

Cummings vs. The Bank, 101 U. S. 143, was this:

The law of the State of Ohio required all moneyed capital to be assessed at its real value, but by a prearrangement

among the assessors the rule of actual valuation was changed so that whilst the shares of banks, National and State, were assessed at their true value, all other moneyed capital was assessed at six-tenths of its value only. The statutory provision was not objectionable, but the actual assessment showed a discrimination against bank shares—State and National—and in favor of other moneyed capital, and the Supreme Court of the United States held that to the extent of the discrimination such assessment was illegal

Do the shares of State Banks constitute the "other moneyed capital," the taxation upon which constitutes the standard of taxation upon National Bank shares? The Court below in this case thought they did, but we submit this is an error.

The original National Banking Act (3 June, 1864, 13 Statutes 111) imposed two conditions upon the taxation of National Bank shares—first, that it should not be higher than upon other moneyed capital, and second, it should not exceed the rate imposed upon shares of State banks.

"The changed condition of the banking interests of the country" (Lionberger *vs.* Rouse, 9 Wall, 468, decided under the second of these limitations), was the occasion of a change in this legislation, and hence in the Act of Congress of February, 1868, (15 Statutes 34), Revised Statutes 5219, this second condition was entirely omitted, and State bank shares thereby thrown into the general body of moneyed capital.

If Congress, in the original act, thought there was other moneyed capital than State bank shares to constitute one of the standards of comparison (and that they did is self-evi-

dent), then, by the subsequent omission of State bank shares as one of those standards it by no means follows that such shares were regarded as the sole standard, but rather the contrary, that they were no longer to be specially considered, the sole comparison being with the "other moneyed capital," which was the remaining one of the original standards.

The fact is that to make the shares of State banks the criterion would afford the National Banks a safety from adverse discrimination. As Mr. Justice Miller said in People *vs.* Weaver, 100 U. S. 539, "it cannot be denied that nearly all the banks in that State (New York) and in all others are National Banks," and that such is peculiarly the fact in the State of Pennsylvania is apparent from the bill in equity in this case. [Record p. 6.] It is there set forth that the capital of the National Banks in that State amounted to $57,000,000, whilst that of all the State banks and savings institutions amounted to $7,000,000 only. But this Court has already ruled upon this point.

In each of the cases of

People vs. Weaver, 100 U. S. 539.
Cummings vs. Bank, 101 U. S. 143.

the shares of State banks were taxed precisely as were those of National Banks, and the discrimination was as compared with other than banking capital. In New York (in the Weaver case) the debts of the owner of bank shares, State and National, were not deducted from the value thereof, whilst they were deducted by the owners of other moneyed capital from the valuation thereof. And so it was in Cummings *vs* The Bank. The shares of State banks, as well as National Banks, were assessed at their full value, while other moneyed capital was assessed at sixty per cent. of its value only.

CONCLUSION.

It is doubtless evident to the Court that this case is prosecuted as a test case only. The sum involved in this case is insignificant, but the amount affected by its result is very large, reaching hundreds of thousands of dollars annually. The plaintiff, and those whose cause he represents, is quite willing and ready to pay all just and equal taxation to the local government, as well as to State and National, but he is not willing to bear the burden which his neighbors do not assist to bear by reason of their ownership of moneyed capital in all its varied forms.

CHARLES W. WELLS,
Counsel for Plaintiff in Error.

113-689

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BRIEF FOR DEFENDANT IN ERROR.

IN THE

Supreme Court of the United States.

No. 1,162, OCTOBER TERM, 1883.

Francis W. Boyer,

vs.

Daniel Boyer, John Leahey and A. J. Shortall, County Commissioners of Schuylkill County.

ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

W. J. WHITEHOUSE,
County Solicitor.

Miners' Journal Job Print, Pottsville, Pa.

In the Supreme Court of the United States.

FRANCIS W. BOYER, *vs.* THE COMMISSIONERS OF COUNTY OF SCHUYLKILL.	No. 1,162, October Term, 1883.

BRIEF OF ARGUMENT FOR THE COUNTY OF SCHUYLKILL.

Although the demurrer was general, the only question discussed in the Courts below was the right of the County of Schuylkill to tax shares of stock in National banks.

Congress does not forbid our taxing the shareholders of National banks; on the contrary, section 5,219 of the Revised Acts expressly recognized this right, as follows:

"Nothing herein (i. e., in the National Banking Act) "shall prevent all the shares in any association from "being included in the valuation of the personal prop- "erty of the owner or holder of such shares, in assess- "ing taxes imposed by authority of the State within "which such association is located, but the Legislature "of each State may determine and direct the manner "and place of taxing all the shares of National banking "associations located within the State, *subject* only to "two restrictions, that the taxation shall not be at *a great- "er rate* than is assessed upon other moneyed capital in "the hands of individual citizens of such State, &c."

The State then having the right to tax the shares of National banks for State or local purposes, has exercised

that right in various ways and at various times, which, so far as taxation for State purposes is concerned, we need not repeat or discuss here; and as to local taxation, we have the following, in the act of March 31, 1870, § 3, P. L. 42:

"All the shares of National banks, and of banks and "savings institutions, shall be taxable for State purposes "at the rate of three mills per annum, upon the assessed "value thereof, and for county, school and municipal "purposes at the same rate as now is, or may hereafter "be, assessed and imposed upon other moneyed capital "in the hands of individual citizens."

This, especially the part that refers to local taxation, is in the words of the restriction of the act of Congress; and so there should be no question as to its constitutionality, for it in no wise conflicts with the constitution of the United States, or of this State, or with the act of Congress in question, or any other.

It is not pretented that the County of Schuylkill has threatened or attempted anything but what comes clearly within the provisions of this act, to wit, to tax the plaintiff's shares of stock *at the same rate* as now is or hereafter may be assessed and imposed upon other moneyed capital,—not a farthing higher or greater.

The plaintiff, however, asserts boldly that this whole section of the act of March 31, 1870, is unconstitutional and void. Why?

Because the Commonwealth has by various other acts exempted sundry other classes of moneyed capital from local taxation, and that, therefore, it is such an unjust discrimination against the shareholders of National banks as comes within the prohibition of the act of Congress. If so, it must be by construction, for there is nothing in

the language of any act of Assembly that could of itself, by any possibility, be so understood.

But an act of Assembly will not be declared unconstitutional and void by a forced or strained construction, nor by dragging in other subsequent and entirely independent acts relating to entirely different matters and subjects.

The following authorities bear on the question in hand:—

In *Everett vs. Steele, et al.*, 3 *Legal Gazette*, 308, Judge Dana, of Luzerne County, held that shares in National banks were taxable for local purposes, even without the aid of the act of 1870, namely under the general revenue act of 1844, on the ground that wherever a National bank was created, its shares of stock, at once *ipo facto* encountered this liability. The act of Congress makes no discrimination between the taxes for State and county purposes, but authorized taxation for either and for both purposes, provided the *rate* does not exceed the prescribed limit.

Judge Dana further proceeds: The general tax law subjects all the moneyed capital of the citizen to county taxation; the language is comprehensive, and (quoting from 4 *P. F. Smith*, 140), the leading intent seems to be to reach money in every form of investments. The exemption, in order to promote the improvement of real estate, of certain securities or investments, cannot affect the question, for generally, and in the main, moneyed capital is taxable.

This decision is, to a great extent, based on *Mintzer vs. Montgomery County*, 4 *P. F. Smith*, 139, which declares that under the act of April 29, 1844, which provides for the taxation of "all shares of stock in any bank,

institution or company, now or hereafter incorporated, &c." The shares of National banks, though not known in 1844, were subject to taxation whenever such banks came into existence. The decision in *Allegheny County vs. Schoenberger*, 1 *Grant*, 35, is here said (p. 141), to be not applicable to the stock in National banks, as it construed a matter concerning State banks only. The shares of banks of other government (i. e., National banks), remain liable to assessment under the 32d section of the act of 1844.

Everett vs. Steele was affirmed by the Supreme Court of Pennsylvania, in the following language: "The stock "owned by the plaintiff was clearly liable to taxation "under the act of 29th April, 1844, and 31 March, 1870. "The provision of the act of 1870 is in strict conformity "with the restriction imposed by the act of Congress. "The plaintiff does not allege in his bill that the tax "levied by the commissioners on the assessed value of "his stock *exceeded the rate* assessed and imposed on other "moneyed capital in the hands of individual citizens of "this State, but only that there are some other classes "of moneyed capital exempt from county tax under the "laws of this State. It does not follow that the tax im- "posed on the plaintiff's stock is illegal or forbidden by "act of Congress, because some other classes of moneyed "capital are exempt from taxation by laws of limited ap- "plication. The act of Congress clearly does not mean "that the stock of National banks shall not be liable to "taxation at all, if some other classes of moneyed cap- "ital are exempt from taxation. If the moneyed capital "of individuals, with certain specified exceptions, is lia- "ble to taxation, then the stock of National banks, in the "hands of its holders, is also liable to taxation."

Everett's Appeal, 21 *P. F. Smith*, 216.

The Cumberland County cases in 29 *Smith*, are the next in order, and it was there ruled by Graham, P. J., that the restriction in the act of Congress as to the rate of taxation was intended to prevent the shares of National banks from being taxed *at a greater rate* than other money capital was taxed by the general laws of the State taxing this kind of property. * "I am, therefore, of opinion "that Congress did not intend that the shares of National "banks should fall within particular exemptions from the "general law, but be subject to its provisions as all other "moneyed capital in the State, which is not excepted "from the general provisions of the general tax laws."

This ruling was affirmed by the Supreme Court upon Judge Graham's opinion.

Gorgas' Appeal, 29 *P. F. Smith*, 149.

The Hepburn case involved substantially the same question, but the only part of the opinion of the Supreme Court of Pennsylvania touching this point was as follows: "The defendant's stock was not taxed *at a higher* "*rate* on its assessed value than other moneyed capital "in the hands of individual citizens."

Carlisle School District vs. Hepburn, 29 *P. F. Smith*, 159.

These are all the authorities we find on the subject in Pennsylvania, but they have so effectually settled this question in favor of the proposed local taxation, that further argument on our part is unnecessary.

But we are told that the federal authorities virtually overruled these cases. We believe it is just the other way. The only two cases we find decided by the U. S. Supreme Court that are at all analogous to the present

case are this same Hepburn case, and the case of *Adams vs. Nashville*, which recognizes and follows it.

In affirming the ruling of the Pennsylvania Court in the Hepburn case, the Chief Justice of the United States says:

"This is a partial exemption only. It was evidently "intended to prevent a double burden by the taxation "both of the property and the debts secured upon it. "Necessarily there may be other moneyed capital in "that locality than such, as is exempt. If there is, "moneyed capital, as such is not exempt, some part of "it only is. It could not have been the intention of "Congress to exempt bank shares from taxation because "some moneyed capital was exempt; certainly there is "no presumption in favor of such an intention. To have "effect it must be manifest. The affirmative of the prop-"osition rests upon him who asserts it."

Hepburn vs. The School Directors, 23 *Wallace*, 485.

In the Nashville case, where a similar objection was raised, the Supreme Court of the United States say:

"Considering the objection on its merits, and in con-"nection with the objection first described, the case is "met by *Hepburn vs. The School Directors*. By a statute "of Pennsylvania it was enacted that all mortgages "judgments, recognizances and monies owing upon arti-"cles of agreement for the sale of real estate shall be ex-"empt from taxation, except for State purposes. There, "as here, it was objected that this exemption, by reliev-"ing certain specified property from taxation, brought "the case within the prohibition of the act of Congress, "and thus vitiated the tax sought to be enforced."

The Court thought otherwise.

"The act of Congress was not intended to curtail the "State power on the subject of taxation. It simply re- "quired that capital in National banks should not be "taxed *at a greater rate than like property similarly in- "vested.* It was not intended to cut off the power to "exempt particular kinds of property, if the Legislature "chose to do so. * The discretionary power over all "these subjects remains as it was before the act of Con- "gress of June, 1874. The plain intention of that stat- "ute was to protect the corporations formed under its "authority from unfriendly discrimination by the States "in the exercise of their taxing power. That particu- "lar persons, or particular articles, are relieved from tax- "ation is not a matter to which either class can object."

Adams vs. The Mayor of Nashville, 95 *U. S. Rep. S. C.*, 19.

This language is general and sweeping, not restricted to mere *local* exemptions of particular things, but allows of all exemptions which the Legislature of the State in its wisdom may see fit to grant, general and throughout the entire State, as well as to certain districts and localities.

These authorities also relieve us from replying to the authorities cited by the complainant, further than to say that none of them are parallel to the present case; and that the discriminations there condemned are either such as are at once apparent and manifest on the face of the act or acts of the State Legislature there in question, or are manifest attempts on the part of local assessors to assess and value other stocks or moneyed capital below their actual value, and even below their par value, while at the same time assessing shares in National banks up

to and far above their par value, for the manifest purpose of creating a most unjust discrimination against the National banks.

Thus fortified by the highest authorities, State and National, it would be an affectation of learning for us to attempt any further argument to sustain the power of the County of Schuylkill to tax the complainant's shares.

Those then are all cases relating to unjust assessments or valuations, and to notorious discriminations plainly and at once apparent on the face of the statue in question, but not one of them questions the right of the State to especially exempt from taxation whatever investments it may deem proper.

For the purpose of encouraging improvements of real estate, or to encourage certain domestic industries or enterprises, it may be the highest wisdom for the Legislature to exempt certain securities or investments, either from all taxation or from partial taxation, either State or local. Again the Legislature may, if liberally disposed, and the State treasury be in a flourishing condition, exempt certain investments or securities from State taxation, and subject them only to local taxation, thus helping along the different local governments, or *vice versa* if they need money badly, or deem it to the best interests of the Commonwealth.

But what would become of our Commonwealth and of our boasted independence, if the State or her local governments were to be called to account before the federal government, or the federal courts, for each and every such act of her Legislature, and have every tax law, general or special, subjected to federal scrutiny. We then could no longer legislate as we deemed best for our own interests, but would live in constant dread lest by

this or that piece of revenue legislation we most unintentially deprive ourselves of important revenues, which we never dreamt of abandoning.

It is not pretended that by this or that particular act of the Legislature, exempting this or that particular security or item of investment, we have thus forfeited our revenues. The plaintiff cannot point to a single act, and say, "this is the act." But he puts together this act and that one, and then gets up a fanciful calculation showing, as alleged, the result or consequences of these several acts; and by such a fanciful theory seeks to destroy the validity of an act of Assembly which was unquestionably constitutional and valid at the time it was passed. The acts of the Legislature, and the principal mischief complained of, are the products of subsequent legislation. But who ever heard of an act of Assembly, valid and constitutional when enacted, become invalid or unconstitutional in consequence of subsequent legislation?

If this act of 1870 be declared unconstitutional now, who knows but what this present, or the next Legislature, may so change the revenue laws as again to subject to local taxation various items that may not be exempt. By what rule shall we judge hereafter whether by such legislation the present cause of complaint (if just it be) has been removed, or how much more legislation will it take to remove this objection, and what tribunal will undertake, in consequence of subsequent legislation, to restore to life, and to declare constitutional and valid again an act of Assembly that is now to be set aside as unconstitutional?

To respond briefly to the argument as to the *status* of our tax laws:

The general revenue act of 29 April, 1844, § 32, (P. L. 497,) Purdon, p. 2,380, pl. 147, which has never been repealed and is to-day in full force, (excepting only as to such items as have been especially exempted from time to time by subsequent legislation,) subject to taxation.

"All mortgages, money owing by solvent debtors, "whether by promissory note, penal or single bill, bond "or judgment; also all articles of agreement and ac- "counts bearing interest, owned or possessed by any "person or persons whatsoever, (except notes or bills "for work and labor done, and bank notes,) *also all shares "of stock in any bank, institution or company, now or here- "after to be incorporated*, by or in pursuance of any law "of this Commonwealth, or of any State or Government "and all shares of stock or weekly deposits in any un- "incorporated saving funds institution, and all public "loans or stocks whatsoever, (except those issued by "this Commonwealth,) and all monies loaned or invested "in any other State. * Together with all other things "now taxable by law."

Surely there could not be a mere general or sweeping taxation of moneyed capital.

Why then is the act of 1870 unconstitutional? Because the act of January 3, 1868, P. L. 1,318, exempts from local taxation shares of stock held by stockholders in any institution or company *incorporated under the laws of this State*, which, in its corporate capacity, is liable to and pays into the State treasury taxes on its capital stock.

But the act of 1870 prescribes a different mode of taxation, and re-imposes local taxation upon all the shares in all banks, State as well as National, and there-

fore to that extent repeals the act of 1868, and is the law in force to-day.

Mortgages and *judgments* are exempted from local taxation by the act of 1881, evidently to avoid the hardships of double taxation, for the tax would in the end have to be paid by the borrower, who is already taxed on the *entire* value of his real estate, without any allowance or deduction for mortgages or judgments or other encumbrances. The same reasoning applies to articles of agreement for the sale of land, which are also exempted by the same act, the land being already fully taxed for all local purposes. What right has this shareholder in this National bank to complain of such an evidently just and equitable exemption?

Notes and bills for work and labor done, are exempted in the general act of 1844. Should we, for the gratification of this National bank stockholder reimpose local taxation on such due bills or notes as our workingmen may hold from their employers, and thus embarrass the laboring man? Happily the days of due bills for work and labor done are over in Pennsylvania.

Railroad bonds are exempted by act of 1854. Our Commonwealth derives probably its principal revenues from its railroads and has therefore the best of reasons to look to her interests in the matter of railroads. They also add immensely to the prosperity of the regions which they traverse; and those regions derive in various indirect ways such immeasureable benefits from the railroads, that they can well afford to yield to the State in the matter of their taxation.

But of what local benefits are banks? Who ever heard of a bank being the means of turning a wilderness into a garden, or of building up our cities and

towns, or creating local traffic, or causing the springing up of factories and other enterprises? They are no doubt good for many purposes, but only follow in the wake of our railroads and other enterprises created by them. Why then should the banks or their stockholders complain of the liberal policy of our Commonwealth toward her railroads;

So also with the bonds, &c., of other corporations, the proceeds of which, as is well known, mostly go to promote internal improvements, and to encourage domestic enterprises. Precious few of our banks are engaged in such laudable works, (if, indeed, they could lawfully do so), and, therefore, they should not complain of the encouragement thus afforded other corporations, which so manifestly serve the public welfare.

As to the shares in banks, &c.: The act of 1850 is clearly repealed by the act of 1870; and *Allegheny County vs. Schoenberger*, 1 *Grant* 35, fell with the act of 1850. It is expressly ruled in *Mintzer vs. Montgomery County*, 4 *P. F. Smith*, 141, that the rule *Allegheny County vs. Schoenberger* is not applicable to National banks.

The act of 1868 has already been referred to.

That United States bonds, and Pennsylvania State bonds, are exempted from local taxation necessarily follows from their being superior sovereignities.

We, however, still have left, under the act of 1844, various items of money capital as subject to local taxation, viz.:

1. *All monies owing by solvent debtors*, (unless secured by mortgage or judgment.)

2. *All articles of agreement and accounts bearing interest*, (unless for the purchase money of real estate.)

3. *All shares of stock in any bank, institution or company,* (unless such institution be incorporated by this State, and do further, as such corporation, pay tax to the State on its capital.)

4. *All shares of stock or weekly deposits in any unincorporated saving fund institution.*

5. *All public loans or stocks whatsoever,* (except those issued by the United States or by this Commonwealth.)

6. *All money loaned or invested in any other State.*

7. *All other things that were taxable in* 1844.

8. *All monies, &c., held in trust, &c.*

We have not the time to make any investigations or calculations as to the amounts of these several species of moneyed capital, if, indeed, those amounts be susceptible of ascertainment, though we rather think that as the State has no special interest in them, the most of them being subject to local taxation only, and not to State taxation, the reports or books of the different departments at Harrisburg would throw but little light on the subject, but we have no doubt that the above long list also represents a very considerable amount of moneyed capital. Just think of the numerous county, city, borough, township and school district bonds, which alone must represent many million of dollars.

In our view of the law it is, however, immaterial what these different securities amount to, and which class preponderates.

The only question involved here is *the rate of taxation,* so that National bank shares *shall not be taxed at a greater rate, &c.* It never can be a question as to which particular items of moneyed capital are taxed, and which are exempted, and the respective amounts thereof. No Court ever applied such a criterion, nor can any Court apply

such a rule, for there are no sufficient data to be had whereby to guage it. It necessarily must and does vary every year, as investments are made or changed, and as each successive Legislature may see proper, either to tax or exempt this or that species of moneyed capital, for State or local purposes, or both, or either.

* * Whenever an *extreme* case is presented of a barefaced, manifest, shocking and evidently intentional discrimination against these banks, such as arose under that New York statute of 1866, (cited by plaintiff, p. 20), it will be time enough to discuss the case of *People vs. Weaver*, cited by the other side; but there is not the slightest analogy between that case and the present.

W. J. WHITEHOUSE,
County Solicitor.

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703-756.

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